

Refusal to Discipline Deceitful Illinois Prosecutor - In re Friedman

Robert C. Cook

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Robert C. Cook, *Refusal to Discipline Deceitful Illinois Prosecutor - In re Friedman*, 29 DePaul L. Rev. 657 (1980)

Available at: <https://via.library.depaul.edu/law-review/vol29/iss2/15>

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

REFUSAL TO DISCIPLINE DECEITFUL ILLINOIS PROSECUTOR—IN RE FRIEDMAN

The American Bar Association Code of Professional Responsibility¹ (Code) is often applied by the Illinois Supreme Court as a standard of professional conduct.² Among the Code's provisions are prohibitions against deceit in the courtroom and the creation and use of false evidence.³ Nevertheless, in *In re Friedman*, the supreme court discharged a disciplinary action against a prosecutor, Morton Friedman, who admitted allowing and encouraging false testimony in court.⁴

The purpose of this Casenote is threefold. First, the Note will review the court's fragmented reasoning, in which the court only indirectly addressed the ethical question of the case. It will then demonstrate that Friedman's conduct was unethical and that the supreme court should not have refused to censure him because of the justification of "good motive." Finally, the Note will examine the impact of the decision on future attorney disciplinary actions.

1. ABA CODE OF PROFESSIONAL RESPONSIBILITY. For a historical perspective on the Code, see generally Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 10-11 (1970). For a critical view of the present Code, see generally Symposium, *Reflection on a Decade Under the Code of Professional Responsibility*, 57 N.C.L. REV. 497 (1979); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977). Concerning the ABA's plans for a new Code, see *Attorneys Pondering the Ethics of Their Trade*, N.Y. Times, Aug. 19, 1979, § E, at 7; Tate, *Ethical Standards Are an Essential Foundation*, 65 A.B.A.J. 1001 (1979).

2. Disciplinary rules are standards of conduct from which attorneys may not deviate without being sanctioned. These disciplinary rules have often been cited in Illinois cases as grounds for attorney disciplinary action. See, e.g., *In re Spencer*, 68 Ill. 2d 496, 370 N.E.2d 210 (1977) (DR 5-105(C)'s rule regarding conflict of interest applied as grounds for censure); *In re Taylor*, 66 Ill. 2d 567, 363 N.E.2d 845 (1977) (DR 6-101(A)(3)'s rule on neglecting a client's affairs applied as grounds for one year suspension).

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rules against deceit include the following sections:

DR 102(A)(4)—A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

DR 7-102(A)(4)—In his representation of a client, a lawyer shall not knowingly use perjured testimony or false evidence.

DR 7-102(A)(6)—In his representation of a client, a lawyer shall not participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

DR 7-109(B)—A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

4. 76 Ill. 2d 393, 392 N.E.2d 1333 (1979). See note 3 *supra* for the text of the four Disciplinary Rules Friedman was charged with breaking. Friedman was also charged with conduct tending to bring the legal profession into disrepute.

The facts of the case were not disputed; Friedman admitted the conduct, but argued it was a necessary prosecutorial tactic that in no way violated ethical standards. *Id.*

BACKGROUND LAW

The question of whether it can ever be ethical for an attorney to lie or allow false statements in court has long been an unresolved and perplexing problem. In recent years, Monroe Freedman, Professor of Law at Hofstra University Law School, has been the leading advocate of the proposition that the need for truthfulness can be outweighed by other factors, such as protecting client confidentiality.⁵ Most commentators, however, have disagreed strongly with Freedman's views.⁶

Although few courts have directly addressed this issue, the California Supreme Court forbids deception by a member of the bar under any circumstances, even outside of the courtroom.⁷ In support of this position, California courts have considered irrelevant the amount of harm actually caused by the attorney's deceit.⁸ This approach was recently adopted by

5. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 27-41 (1975) [hereinafter cited as FREEDMAN].

Other professions have similar dilemmas about the need for honesty. In journalism, for example, the Pulitzer Prize Board refused to give the 1979 prize for local investigative reporting to the *Chicago Sun-Times* because the newspaper ran a tavern under a false name to uncover local corruption. One editor on the Pulitzer Board said reporters should never misrepresent themselves under any circumstances. See *Debate on Exposés Held Up a Pulitzer*, N.Y. Times, April 18, 1979, § B, at 4. See generally notes 75-77 and accompanying text *infra*.

6. Especially detailed criticism is provided in Rotunda, *Book Review: Lawyer's Ethics in an Adversary System*, 89 HARV. L. REV. 622, (1976), and Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 UTAH L. REV. 653 (1977).

Lawry asserts that the judicial system is corrupted whenever a lawyer lies in court. *Id.* at 654-95. Although he strongly disagrees with Freedman's ideas, Lawry compliments Freedman's book as having an "indispensible place in the literature of professional responsibility, and it is, at present, the port for all departures." *Id.* at 653. Lawry argues that even if total truthfulness cannot always be expected, it should always be a goal: "The fact that the system may result in a failure to gain the whole truth does not mean that the system can or does countenance lying." *Id.* at 657.

For an argument that lawyers should never falter in honesty, even outside the courtroom, see Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 583-90 (1975). Rubin, a federal judge, also noted the scarcity of cases involving attorney dishonesty. *Id.* at 587. See generally Frankel, *The Search for Truth—An Umpireal View*, 30 *The Record of the Assoc. of the Bar of the City of N.Y.* 21 (1975).

7. See, e.g., *Segretti v. State Bar*, 15 Cal. 3d 878, 544 P.2d 929, 126 Cal. Rptr. 793 (1976) (attorney suspended from the practice of law for two years with three years probation for engaging in covert, deceitful activities on behalf of the re-election of the president of the United States); *Cutler v. State Bar*, 71 Cal. 2d 241, 455 P.2d 108, 78 Cal. Rptr. 172 (1969) (attorney disbarred after attempting to deceive another attorney concerning the return of a client's funds); *McKinney v. State Bar*, 62 Cal. 2d 194, 397 P.2d 425, 41 Cal. Rptr. 665 (1964) (attorney disbarred after fraudulently endorsing documents to deceive bank).

8. See, e.g., *Mosesian v. State Bar*, 8 Cal. 3d 60, 500 P.2d 1115, 103 Cal. Rptr. 915 (1972) (attorney reprimanded for falsely impugning under oath the sexual morality of his aunt); *Reznik v. State Bar*, 1 Cal. 3d 198, 460 P.2d 969, 81 Cal. Rptr. 769 (1969) (attorney suspended from the practice of law for three years after altering cancelled check in an unsuccessful effort to deceive a court); *McKinney v. State Bar*, 62 Cal. 2d 194, 397 P.2d 425, 41 Cal. Rptr. 665 (1964).

the District of Columbia Court of Appeals, in disciplining an attorney because he used deceitful tactics in a labor dispute.⁹ Furthermore, in 1978, the New York Court of Appeals stated that a prosecutor could not ethically encourage a witness to lie under oath solely for the purpose of obtaining a perjury conviction against the witness.¹⁰ The New York court held that bad prosecutorial motive can be a successful defense to the perjury charge.¹¹ In addition, several federal courts have condemned blatantly deceitful tactics as a reckless affront to the judiciary.¹² The fact that several jurisdictions have held attorneys to strict standards of honesty shows that truthfulness can be considered of primary importance to the proper functioning of the court system.

ATTORNEY DISCIPLINE IN ILLINOIS

The Illinois Supreme Court has ultimate authority over the Illinois system of attorney discipline.¹³ Supreme Court Rules empower the Illinois Attorney Registration and Disciplinary Commission to act as the supreme court's agent in prosecuting disciplinary cases.¹⁴ Procedurally, after the commis-

9. *In re Keiler*, 380 A.2d 119 (D.C. Cir. 1977) (attorney suspended from the practice of law for one month for inviting his law partner to arbitrate a labor dispute without telling the union that the arbitrator was his partner).

10. *People v. Tyler*, 46 N.Y.2d 251, 385 N.E.2d 1224, 413 N.Y.S.2d 295 (1978). The defendant in *Tyler* proved that the prosecutor substantially tailored his questioning before a grand jury to extract false answers. The court held that where no legitimate investigatory function can be shown, a perjury conviction against that witness is not justifiable. *Id.* at 259, 385 N.E.2d at 1228, 413 N.Y.S.2d at 299.

11. *Id.*

12. *See, e.g.*, *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973) (where undercover agent committed bribery and perjury to catch corrupt public officials, the court heavily criticized the practice but reversed on other grounds); *United States v. Rispo*, 460 F.2d 965 (3d Cir. 1972) (the court held that a fair trial was denied defendant because a government informer pretended to be a co-defendant and the informer's attorney helped plan the litigation strategy of the other defendants); *United States v. Lusterino*, 450 F.2d 572 (2d Cir. 1971) (the court held it reversible error for an informer to pose as an accomplice to the defendant and admit guilt in front of the jury).

13. *See In re Teitelbaum*, 13 Ill. 2d 586, 150 N.E.2d 873, *cert. denied*, 358 U.S. 881 (1958) (the court's inherent power to discipline attorneys is based on an 1899 case establishing an inherent right to prescribe rules for the study of law and admission to practice. *In re Day*, 181 Ill. 73, 54 N.E. 646 (1899)). *See In re Nesselson*, 76 Ill. 2d 135, 390 N.E.2d 857 (1979), in which the supreme court granted a petition for reinstatement, citing exclusive authority to regulate the practice of law. *Id.* at 138, 390 N.E.2d at 858. In addition, in *In re Sherman*, 60 Ill. 2d 590, 328 N.E.2d 553 (1975), the court, citing its ultimate authority for deciding discipline cases, did not follow the review board's recommended action that the attorney be suspended but instead only censured the attorney. The court reasoned that the fact the client suffered no loss did not excuse the conduct, but that discipline should be mitigated because there was no other evidence of misconduct in Sherman's 20 year legal career.

14. ILL. REV. STAT. ch. 110A, § 751 (1977). On November 28, 1966, the Supreme Court of Illinois adopted new rules governing trial and appellate procedures. The Supreme Court Rules have now been incorporated into the Illinois Revised Statutes by the General Assembly and include affirmation of the court's power to govern the registration and discipline of attorneys.

sion's informal investigation of suspected misconduct, the commission's administrator sends the case to the inquiry board.¹⁵ The inquiry board evaluates the evidence and decides whether a formal complaint should be filed with the hearing board.¹⁶ All hearing board decisions against the attorney proceed next to the review board.¹⁷ The attorney can avoid the possibility of a public sanction by accepting a reprimand at the hearing board level.¹⁸ The review board may dismiss the charges, reprimand the attorney, or recommend that the Illinois Supreme Court censure, suspend, or disbar the respondent. If the attorney wants to appeal the review board's determination, an exception must be filed with the supreme court within 21 days after service of the report. The court, at its discretion, may consider the case.¹⁹

The commission has considerable discretion in deciding the types of attorney conduct to prosecute: it has authority to investigate and bring disciplinary charges against any attorney whose conduct tends to defeat the administration of justice or bring the courts or the legal profession into disrepute.²⁰ The exact meaning of this standard of conduct is not always clear, however, because of the supreme court's refusal to formally adopt the Code²¹ or to adhere strictly to *stare decisis*.²² Instead, Illinois courts de-

Id. Consequently, the Illinois attorney discipline process is governed by the Supreme Court Rules and by the commission's own administrative rules. Both sets of regulations are set forth in a pamphlet published by the commission. See generally ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION, RULES OF THE SUPREME COURT OF ILLINOIS AND THE ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION (May 1, 1977). Before 1973, when the present attorney disciplinary system became operative, local bar associations acted as commissioners of the supreme court in disciplinary proceedings. See generally Murphy, *A Short History of Disciplinary Procedures in Illinois*, 60 ILL. BAR. J. 528 (1972).

15. ILL. REV. STAT. ch. 110A, § 753(a) (1977). The inquiry board, comprised of not less than 21 members, may act in panels of not less than three members, as designated by the commission. The members, appointed by the commission, serve annual terms as commissioners of the court. In addition to investigating matters referred to it by the administrator, the inquiry board also has the power to initiate an investigation. Complaints voted by the inquiry board are prepared by the administrator and filed with the hearing board.

16. *Id.* § 753(c). The hearing board, comprised of at least 21 members, may also act in three-member panels appointed for one-year terms by the commission. The hearing board makes findings of facts and conclusions of fact and law, together with a recommendation for discipline, dismissal, or nondisciplinary suspension. *Id.*

17. *Id.* § 753(d)-(e). The nine-member review board is appointed by the Supreme Court. Appointments are for three-year terms. A concurrence of five members is required before the review board can reach a decision. *Id.*

18. *Id.* §§ 753, 769. This is an attorney's last chance to totally avoid publicity by privately accepting a reprimand.

19. *Id.* § 753(e).

20. *Id.* § 752.

21. Although the court often applies the Code as a standard of conduct, see note 2 and accompanying text *supra*, the court has never formally adopted the Code. Furthermore, because there is no strict *stare decisis* in Illinois attorney discipline cases, the fact that the Code was applied in one case does not necessarily mean it will always be applied. See note 23 *infra*.

22. See, e.g., *In re Kien*, 69 Ill. 2d 355, 372 N.E.2d 376 (1977); *In re Howard*, 69 Ill. 2d 343, 372 N.E.2d 371 (1977); *In re Nesselson*, 35 Ill. 2d 454, 220 N.E.2d 409 (1966).

cide each case on its own facts in an ad hoc fashion,²³ based on the assumption that every attorney discipline case is unique.²⁴

THE FACTS OF *IN RE FRIEDMAN*

On May 12, 1976, the Illinois Attorney Registration and Disciplinary Commission brought disciplinary charges against Morton Friedman for his conduct while chief of the criminal division of the Cook County State's Attorney's Office. Friedman was charged with conduct tending to bring the legal profession into disrepute and with violating four Disciplinary Rules of the Code.²⁵ Specifically, Friedman was charged with knowingly using false evidence, creating false evidence, secreting a witness, and acting in a manner involving dishonesty, fraud, deceit, or misrepresentation.²⁶ The facts, as stipulated by the parties, revealed that during two court proceedings, Friedman knowingly allowed and encouraged police officers to perjure themselves.

The complaint against Friedman contained two counts. The facts that gave rise to Count I began in 1973, when Charles Graber was arrested by Officer Jerry Maculitis and charged with driving under the influence of alcohol. Maculitis met with Friedman after the officer believed he had been offered a bribe by Lee Howard, Graber's attorney. Friedman directed the officer to follow Howard's instructions even if they required him to commit perjury. Following instructions, the officer falsely told the court that the "breathalyzer" operator, whose testimony was needed, was not present. In fact, the witness was in the courtroom waiting to testify. After the charges against Graber were dismissed, Howard paid Maculitis the money he had promised. The judge was then advised of what happened.²⁷ Later, Howard was suspended from the practice of law for two years.²⁸

23. Since neither the Code nor the case law is controlling, Illinois attorneys are left with only a vague common law of ethics to guide them. Swett, *Illinois Attorney Discipline*, 26 DE-PAUL L. REV. 325, 333, 343-44 (1977). Virtually nothing else has been written about this common law of ethics, which seems to create a serious problem for the Illinois practitioner. There is apparently only one other law review article on this topic, providing a collection of Illinois disciplinary decisions prior to 1932. See Note, *An Illinois Disbarment Proceeding*, 26 ILL. L. REV. 457 (1932).

24. See, e.g., *In re Nesselson*, 35 Ill. 2d 454, 220 N.E.2d 409 (1966). See note 13 *supra*.

25. 76 Ill. 2d at 393, 392 N.E.2d at 1333.

26. *Id.*

27. *Id.* at 393-94, 392 N.E.2d at 1333-34.

28. *In re Howard*, 69 Ill. 2d 343, 372 N.E.2d 371 (1977). Leaving the courtroom, Maculitis asked Lee Howard how he had done and Howard answered, "Super." The officer then motioned Howard into the washroom and motioned again toward his pocket. Howard placed \$50 in the officer's pocket and Maculitis handed him a grand jury subpoena.

Howard was acquitted in Cook County Circuit Court of criminal bribery charges. Attorney disciplinary charges were then brought by the commission. The respondent argued that there was no unethical conduct because his motive was good. The hearing board stated: "We consider it an insult to our intelligence for you to suggest that you paid the money to the officer in order to get him to tell the truth." The hearing board, however, recommended only reprimand. When the Administrator did not agree, the hearing board dismissed the charges "with reluc-

A similar situation gave rise to Count II. Juanita Guevera was arrested by Officer Jose Martinez for the aggravated battery of Awilda Torres. After meeting with Guevera's attorney, Paul Powell, Officer Martinez told Friedman that Powell would pay him to arrest Torres and use the threat of prosecution to persuade her to drop the charges against Guevera. Friedman told Martinez that he should give the appearance of cooperating with Powell. Friedman also said that if Martinez was called as a witness at the preliminary hearing, he should tell the court that Torres did not wish to appear.²⁹ Martinez then testified falsely under oath that he had spoken with Torres and her mother, and found that they did not wish to prosecute. Torres and her mother had, in fact, arrived at the hearing willing to testify, but were escorted to the State's Attorney's Office and kept waiting, after being told of the investigation of Powell. After the hearing, Powell made the \$250 payment to Martinez. The court was informed of the ploy to gather evidence against Powell and the charges against Guevera were reinstated.³⁰ Powell was subsequently convicted of bribery.³¹

After the charges of deceit were brought against Friedman by the Attorney Registration and Disciplinary Commission, the case then proceeded to the hearing board which found that the Code had not been violated. The conduct was not unethical because of the lack of intent to permanently deceive the court system.³² The review board, however, rejected these con-

tance." *Id.* at 353, 372 N.E.2d at 375. The review board reversed the hearing board and unanimously recommended disbarment. The board called this case "a most striking example of a breakdown of basic concepts of legal integrity and a most serious challenge to the credibility of the judicial process." *Id.* at 350, 372 N.E.2d at 374.

Howard argued before the supreme court that he had paid for truthful testimony, that he had twice been found innocent of wrongdoing, and that he had been entrapped. The court flatly rejected the proposition that there could ever be a proper motive for influencing testimony. In addition, the court held that evidence insufficient to convict on criminal charges may be sufficient to show a deviation from ethical standards of conduct. Finally, the supreme court held that the entrapment defense might not be available in attorney discipline cases; however, even if it were available, the necessary prolonged or persistent pressure was not shown in this case. *In re Howard*, 69 Ill. 2d 343, 372 N.E.2d 371 (1978).

29. 76 Ill. 2d at 395, 392 N.E.2d at 1334.

30. *Id.* at 394-95, 392 N.E.2d at 1334.

31. *People v. Powell*, 72 Ill. 2d 50, 377 N.E.2d 803 (1978). After the hearing, Powell asked Martinez to follow him to his car, which was parked outside. As they drove around the block, Powell threw two \$100 bills and a \$50 bill on the floor in front of Officer Martinez's shoes. The officer picked up the money, handed Powell a grand jury subpoena, then left the car. Powell drove a short distance, left his car, and approached Martinez. Martinez then turned on a miniature recorder.

This tape recording was apparently very important evidence against Powell. Excerpts in the supreme court's opinion show that Powell pleaded with Officer Martinez not to turn the evidence against him over to the State's Attorney. The supreme court reversed the appellate court and affirmed the circuit court's conviction of Powell for bribery and solicitation of the obstruction of justice. *Id.*

32. 76 Ill. 2d at 393, 401-02, 392 N.E.2d at 1333, 1337-38. This is the position adopted by the concurring justices. *Id.*

clusions and recommended that the Illinois Supreme Court censure Friedman.³³

THE COURT'S REASONING

In *In re Friedman*, the Illinois Supreme Court refused to discipline the attorney despite the fact that he admitted allowing and encouraging false testimony in court.³⁴ Although four of the six justices who heard the case condemned the use of deceit, two of the four, Chief Justice Goldenhersh and Justice Kluczynski, found other factors controlling.³⁵ These justices, in delivering the court's decision, noted that no court had ever before decided if it was ethical for a prosecutor to engage in conduct violative of the Code for the purpose of developing evidence to be used in a subsequent prosecution.³⁶

The court then reviewed the two contentions made by respondent. First, the respondent argued that the court-tolerated deceit in narcotics cases illustrates that the Code does not immunize the courtroom from deceptive investigative tactics.³⁷ The respondent also argued that his lofty motive negated any technical violation of Code provisions and that any intent to subvert the judicial process instead originated with the corrupt attorneys.³⁸ The attor-

33. 76 Ill. 2d at 393, 392 N.E.2d at 1333. The review board made this determination by a five-to-three vote on Feb. 28, 1978. *Id.*

34. The facts of the case were not disputed, *see* note 4 *supra*.

35. 76 Ill. 2d at 392-99, 392 N.E.2d at 1333-36. Chief Justice Goldenhersh delivered the decision of the court, joined by Justice Kluczynski. These justices denounced the deceit yet voted not to censure Friedman. The two concurring justices found Friedman's conduct ethical. *Id.* at 399-405, 392 N.E.2d at 1336-39. The justices writing the two dissents found Friedman's conduct deserving of censure. *Id.* at 406-13, 392 N.E.2d at 1339-43.

36. *Id.* at 395, 392 N.E.2d at 1334.

37. *See* *United States v. Russell*, 411 U.S. 423, 435-36 (1973); *Sorrels v. United States*, 287 U.S. 435, 442 (1932). Courts have often allowed the use of deceitful tactics in narcotics investigations. The entrapment defense is defined very narrowly by the United States Supreme Court and can be used successfully only when the government's deception actually implants the criminal design in the defendant's mind. *Id.*

Nevertheless, this kind of investigative tactic has been heavily criticized for allowing governmental participation in crimes as a substitute for skillful investigation. Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203 (1975); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs*, 60 YALE L.J. 1091 (1951); Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683 (1975); Lackland, *United States v. Russell: The Defense of Entrapment as Merely a Question of Intent*, 5 COLUM. HUMAN RIGHTS L. REV. 523 (1973).

Illinois, by statute and through case law, has expanded the entrapment defense beyond the Supreme Court's *Russell* decision to offer more protection against extreme police practices. ILL. REV. STAT. ch. 38, § 7 (1977); *People v. Dollen*, 53 Ill. 2d 280, 290 N.E.2d 879 (1972). *See also* 23 DEPAUL L. REV. 570 (1973). By statute, the legislature had made entrapment an affirmative defense, giving the state the burden of proving the absence of entrapment beyond a reasonable doubt since some evidence of entrapment is introduced. ILL. REV. STAT. ch. 38, §§ 3, 7 (1977); *People v. Jensen*, 37 Ill. App. 3d 1010, 1015, 347 N.E.2d 371, 376 (1st Dist. 1976).

38. The good motive argument was found controlling by the original hearing board, *See* note 32 and accompanying text *supra*.

ney disciplinary commission, on the other hand, contended that although deceit is permissible in drug investigations, it may not be employed where evidence is being gathered for subsequent prosecution of another matter.³⁹ The commission also argued that motive should only be considered in determining the appropriate sanction and not in deciding whether there has been professional misconduct.⁴⁰

In finding that respondent's conduct violated accepted ethical guidelines, the court noted that American Bar Association Standards require prosecutors to know and follow standards of professional conduct defined in the codes and canons of the legal profession.⁴¹ The court also noted that ABA Standards expressly prohibit the use of false evidence,⁴² as well as the Code barring deceit in the courtroom.⁴³ Therefore, the justices delivering the court's decision concluded that the ends do not justify the means. No violation of the integrity of the courtroom can be condoned, no matter what its motivation.⁴⁴

After constructing this careful argument delineating that Friedman's conduct was, in fact, unethical, Chief Justice Goldenhersh and Justice Kluczynski then held that he should not be disciplined, listing four reasons without further discussion. The court reasoned that Friedman acted "from a sincere, if misguided, desire to bring corrupt attorneys to justice."⁴⁵ In addition, other reasons listed included the absence of precedent or settled opinion on this exact issue,⁴⁶ the belief among some attorneys that such deceit is an acceptable tactic,⁴⁷ and the evidence that Friedman had served the public diligently and with integrity in the past.⁴⁸

39. Governmental deceit in any investigation, even narcotics investigations, should be very carefully limited. See note 37 *supra*. See generally notes 75-77 and accompanying text *infra* for the proposition that no deceit is ever fully justifiable.

40. 76 Ill. 2d at 396, 392 N.E.2d at 1335.

41. *Id.* citing ABA STANDARDS, THE PROSECUTION FUNCTION § 1.1(d) (1971).

42. *Id.* citing ABA STANDARDS, THE PROSECUTION FUNCTION § 5.6(a) (1971).

43. See notes 2, 3, and accompanying text *supra*.

44. 76 Ill. 2d at 397, 392 N.E.2d at 1335.

45. *Id.* at 399, 392 N.E.2d at 1336.

46. *Id.* Even if there had been clear case precedent on this issue, it might not have been ample guidance for Friedman because the Illinois Supreme Court does not strictly follow stare decisis in attorney discipline cases. See notes 21-24 and accompanying text *supra*. See also notes 87-89 and accompanying text *infra*.

On the other hand, the justices themselves pointed out that the Code of Professional Responsibility has clear provisions prohibiting deceit in the courtroom. 76 Ill. 2d at 396-98, 392 N.E.2d at 1335-36. See notes 41-44 and accompanying text *supra*.

47. 76 Ill. 2d at 398-99, 392 N.E.2d at 1336. The court cited *In re Luster*, 12 Ill. 2d 25, 145 N.E.2d 75 (1957), as authority for not censuring Friedman. In *Luster*, however, there was reliance on an actual unpublished court decision and not reliance, as here, on an "apparently considerable belief" demonstrated only by statements from well-known attorneys made after respondent was charged with misconduct. *Id.* See note 50 *infra*.

48. See notes 92-93 and accompanying text *infra*.

Justice Underwood's concurrence,⁴⁹ joined by Justice Ryan, found Friedman's conduct ethical because his actions were necessary under the circumstances and free from any intent to permanently deceive the courts. These justices noted that a number of respected attorneys submitted statements on Friedman's behalf, arguing that his conduct involved no professional impropriety.⁵⁰ The concurring justices found that there were no alternative prosecutorial tactics available to Friedman and specifically rejected alternatives such as charging the suspect defense attorneys with solicitation of perjury or attempted bribery.⁵¹ Characterizing these alternatives as "naive," the concurring justices reasoned that prosecutions based upon one police officer's testimony of an ambiguously phrased offer will rarely succeed against a lawyer's vigorous denial.⁵² In addition, the concurring justices applied the criminal code's necessity defense,⁵³ asserting that some misrepresentation to the judge is required in order to secure the evidence of pay-

49. 76 Ill. 2d at 399-405, 392 N.E.2d at 1336 (Underwood, J., concurring). The justices noted that they concurred only in the decision and not in the rationale so that the complaint against Friedman may be discharged in accordance with the quorum requirement of the Illinois Constitution. The Illinois Constitution requires a four vote quorum for the supreme court to decide a case. ILL. CONST. art. VI, § 3 (1970). If the court had not been able to reach some kind of a decision, Friedman would have been censured. The Illinois court follows United States Supreme Court practices when there is no quorum, affirming the decision below without giving it precedential value. *Perlman v. First Nat'l Bank of Chicago*, 60 Ill. 2d 529, 331 N.E.2d 65 (1975). See generally *Neil v. Biggers*, 409 U.S. 188 (1972).

50. The following eight attorneys submitted affidavits stating that Friedman's conduct was ethical because he had a good motive: Professor Monroe Freedman of Hofstra Law School; Cook County Circuit Judge Wayne W. Olson; Gino L. DiVito, Deputy State's Attorney, Criminal Prosecution Bureau; David Dorsen, former Assistant Chief Counsel of the Senate Watergate Committee; James M. Schreier, Chief, Felony Trial Division, Cook County State's Attorney's Office; James B. Haddad, Professor of Law, Northwestern University; Nicholas J. Motherway, Phillip H. Corboy and Associates; and James R. Kavanaugh, Cook County State's Attorney's Office. Respondent's Brief at 1a-32a.

These attorneys, with the exception of Freedman and Dorsen, also submitted personal character references. In addition, fifteen other attorneys and eight non-lawyers submitted character references. *Id.* These statements are relied upon by the concurring justices as extensive authority for the proposition that deceit can be used as a proper investigative tactic. 76 Ill. 2d at 399, 392 N.E.2d at 1336. The concurring justices also note that six of the 11 members of the two panels below considered Friedman's conduct ethical. *Id.* (Underwood, J., concurring).

51. *Id.* at 404, 392 N.E.2d at 1338.

52. *Id.* For further discussion on alternatives available to Friedman, see notes 78-85 and accompanying text *infra*.

53. ILL. REV. STAT. ch. 38, § 7-13 (1977), provides for a necessity defense as follows:

Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.

For further analysis of the Illinois statute, see Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L. REV. 266, 283 (1975); see also Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 STANFORD L. REV. 213, 239 (1975).

ment that is a "practical necessity" to obtain the conviction of a lawyer suspected of corruption.⁵⁴ Concluding that deceit in the courtroom might sometimes be a necessary investigative technique, the two concurring justices found that a requirement of "intent to permanently deceive" should be read into the Code's provisions prohibiting deceit.⁵⁵

Justice Clark and Justice Moran each separately dissented, agreeing with the majority's reasoning but rejecting its decision. The two dissenters also strongly rejected the reasoning of the concurring justices.⁵⁶ Justice Clark found that an attorney does not have the power to determine if there is a good reason for deceiving a judge, even temporarily.⁵⁷ He insisted that Friedman should have employed alternative tactics despite their limitations, rather than sacrifice the integrity of the courtroom.⁵⁸ Justice Moran

54. 76 Ill. 2d at 405, 392 N.E.2d at 1339. The concurring justices cited *In re Howard*, 69 Ill. 2d 343, 372 N.E.2d 371 (1978), to show the difficulty in obtaining convictions in bribery cases, even where money has been paid. Howard was acquitted of criminal bribery charges despite the fact that money had changed hands. Ironically, this is one of the cases where Friedman's innovative methods were employed to gather evidence. See note 28 and accompanying text *supra*. *In re Howard* makes painfully clear the fact that convictions are not always obtained more easily just because deceitful tactics are used. Furthermore, the purpose of the judicial system is not to achieve convictions but to achieve justice. See note 69 and accompanying text *infra*.

55. 76 Ill. 2d at 405, 392 N.E.2d at 1339. Monroe Freedman's affidavit is cited as authority for the argument that the Code of Professional Responsibility should require an intent to permanently deceive. The concurring justices cited Freedman's quotation from his book: "Motive is, of course, a primary consideration in making judgments regarding the ethical quality of conduct." *Id.* at 400, 392 N.E.2d at 1446, quoting FREEDMAN, *supra* note 5, at 83. An examination of the text cited, however, shows that in the same paragraph Freedman explained why prosecutors must be held to the highest of ethical standards: "We are concerned here with the attorney as public official, wielding enormous governmental powers, and responsible for assuring not only that justice be done but that it appear to be done." FREEDMAN, *supra* note 5, at 83. This qualification on the importance of good motive suggests that Professor Freedman understands the harm a well-meaning prosecutor can do. See notes 68-70 and accompanying text *infra*. See generally Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967).

As for the finding of the concurring justices that deceit by attorneys might sometimes be allowable, they make no attempt to set forth when this temporary deceit would be an acceptable tactic and when it would not. One advantage of a blanket rule prohibiting all deceit by attorneys, or prohibiting all deceit by attorneys in court, would be that such a rule would not require constant judicial interpretation of the question of when deceit would or would not be tolerable. See notes 5-12 and accompanying text *supra*.

56. 76 Ill. 2d at 406-13, 392 N.E.2d at 1339-43 (Clark, J., dissenting; Moran, J., dissenting).

57. *Id.* at 411, 392 N.E.2d at 1342.

58. *Id.* The alternative Justice Clark found most practical was that Friedman could have advised the trial judges or some other judicial officer of his plan before allowing the untruthful testimony. Justice Clark also rejected the argument that Disciplinary Rule 7-110(B) of the Code of Professional Responsibility precludes such a conference. DR 7-110(B) states:

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

characterized the concurring opinion's approach as "intolerably dangerous" in that it suggested, under the guise of necessity, that the ends can justify the means.⁵⁹ He also asserted that truth is essential to the court system's successful operation and that "one need not be trained in the law to know that it is flatly unacceptable to prevaricate to or mislead the court or to be instrumental in encouraging others to do so."⁶⁰

CRITICISM AND ALTERNATIVES

The court did not discipline Friedman largely because a number of well-known attorneys insisted that his good intentions justified his conduct.⁶¹ There are, however, at least four reasons why good motive should not have been considered a controlling factor. First, regardless of motive, the role of the judge was usurped. In addition, individuals' rights might be threatened in the future by prosecutors who will also claim good intentions. Third, motive is almost impossible to determine accurately. Finally, good motive cannot be used to justify deceit when non-deceitful tactics are provided by statute.

An attorney who deceives a court, even for good reasons, has overstepped long recognized bounds of authority⁶² and has disrespectfully trampled on the court's integrity.⁶³ The fact that truthfulness is vital to the function of the judicial system is clearly demonstrated not only by the Disciplinary

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

Justice Clark argued that this rule is inapplicable because this kind of suitation does not involve the merits of the case. Secondly, even if this rule is applicable it allows communication "as otherwise authorized by law." Finally, Justice Clark asserted that even if there was a reason why Friedman could not talk to the trial judge, he should have spoken with the Chief Judge of the division or some other court officer instead of proceeding in sole reliance on his own belief that his action was proper. 76 Ill. 2d at 411, 392 N.E.2d at 1342. See note 85 and accompanying text *infra* for three reasons why this seemingly practical solution should be rejected.

59. 76 Ill. 2d at 412, 392 N.E.2d at 1342.

60. *Id.*

61. See notes 47, 50, and accompanying text *supra*.

62. *United States v. Nixon*, 418 U.S. 683, 703-09 (1974) (legitimate judicial need for information outweighs the need for absolute executive privilege); *United States v. United States District Court*, 407 U.S. 297, 314-18 (1972) (judicial approval of searches is required even in domestic security cases; broad police investigative powers must be tempered with objective judicial screening to protect the privacy rights of individuals); *Marbury v. Madison*, 5 U.S. 137, 176 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

63. Friedman's conduct can be compared roughly to a trespass action. The fact that no harm was immediately apparent does not mean that a valid interest was not infringed upon. See *Dougherty v. Stepp*, 18 N.C. 370 (1835) (tort trespass action allowed on principle that damage is inferred by law whenever there is unauthorized entry onto the land of another).

Rules against deceit,⁶⁴ but also by state statutes against perjury⁶⁵ and by the oath that witnesses must take before testifying.⁶⁶ Moreover, allowing a motive defense might result in additional encroachments on the autonomy of the judiciary by other zealous prosecutors.⁶⁷ For this reason, any attorney who deceives a judge for his own purposes, no matter how laudatory, should be seen as showing a dangerous and arrogant disrespect for the judiciary. This disregard warrants discipline in itself, regardless of the fact that no harm to the parties may be immediately apparent.

Beyond invasion of the judicial role, a second reason for disregarding motive as a controlling factor in *Friedman* is that the public must be protected from well-meaning government officials who use their power unwisely without actually breaking the letter of the law.⁶⁸ Even if it can be assumed momentarily that Friedman was expertly able to manipulate the judicial system without apparent harm, the next prosecutor determined to win a conviction⁶⁹ might not be able to use deceit so masterfully. The integrity of the courtroom, however, is too important to the proper functioning of the adversary system to entrust it to one of the adversary parties for safekeeping.⁷⁰

A third obvious problem with motive is that it is difficult to ascertain accurately. In fact, the various opinions in *In re Friedman* interpret Fried-

64. See note 3 *supra*.

65. ILL. REV. STAT. ch. 38, § 32-2 to -3 (1977).

66. ILL. REV. STAT. ch. 101, § 3 (1977).

67. For a discussion of prosecutorial zeal, see Seymour, *Why Prosecutors Act Like Prosecutors*, Vol. 11, No. 6, *The Record of the Assoc. of the Bar of the City of N.Y.* 302, 312-13 (1956); Felkenes, *The Prosecutor: A Look at Reality*, 7 S.W.U. L. REV. 98, 109-12 (1975). See generally NATIONAL COLLEGE OF DISTRICT ATTORNEYS, *THE PROSECUTOR IN AMERICA: ROLES AND FUNCTIONS OF THE PROSECUTOR* (1977).

68. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting):

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

For an example of the harm an unscrupulous public official can do legally while claiming good motives, see generally R. FRIED, *MEN AGAINST MCCARTHY* (1976). See also FREEDMAN, *supra* note 5, at 83; Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967); 2 HOFSTRA L. REV. 385, 404 (1974). But see Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145 (1973).

69. See Felkenes, *The Prosecutor: A Look at Reality*, 7 S.W.U. L. REV. 98, 110-12 (1975). Imitation of superiors and peer group pressure are two factors that help to lead many prosecutors into a dangerous "conviction psychology," where defendants are presumed guilty because an innocent person would not be introduced into the criminal justice process. Consequently, some long-time prosecutors see the judicial system as a means for obtaining convictions, not justice. *Id.*

70. Encouraging deceit by a witness is not a proper prosecutorial tactic. Although the motive of the prosecutor has seldom been an issue at trial, the New York Court of Appeals has held that overtly bad prosecutorial motive can be a defense in a criminal action. *People v. Tyler*, 46 N.Y.2d 251, 259, 385 N.E.2d 1224, 1228, 413 N.Y.S.2d 295, 299 (1978). See note 10 and accompanying text *supra*.

man's intentions differently. Justice Clark characterized Friedman's motive as arrogant and self-righteous.⁷¹ The concurring opinion portrayed him as a tough, upstanding prosecutor.⁷² The decision of the court, however, referred to him as "sincere, if misguided."⁷³ Rather than allowing an attorney discipline decision to rest on an adjudication of the sincerity or arrogance of the attorney, it is more logical, and perhaps more just, to focus on the conduct as is done in other types of attorney discipline cases.⁷⁴

A fourth reason for rejecting a good motive defense is that any justification of deceit undercuts the public's already-shaken confidence in American institutions.⁷⁵ Over the past several decades, lying as a socially acceptable alternative in problem solving has become increasingly prevalent.⁷⁶ This

71. 76 Ill. 2d at 407-08, 392 N.E.2d at 1340 (Clark, J., dissenting). Justice Clark stated "[T]hat no prior case has addressed the precise form of deception practiced here is hardly exculpatory: If anything, the absence of such authority indicates that prosecutors ordinarily do not consider it within their power to determine whether to deceive judges." *Id.*

72. *Id.* at 405, 392 N.E.2d at 1339 (Underwood, J., concurring). The concurring justices characterize Friedman's motivation and conduct in this way: "In short, it is undisputed that respondent was a conscientious prosecutor dedicated to improving the administration of criminal justice. . . . At no time did respondent intend to permanently deceive anyone, and the necessary, temporary deception practiced upon the court was corrected immediately after it had served its purpose." *Id.*

73. *Id.* at 399, 392 N.E.2d at 1336.

74. In three recent bribery cases, the supreme court rejected arguments that the respondent-attorneys were only paying witnesses money to obtain the truth. *In re Porcelli*, No. 51772 (Ill. Nov. 21, 1979) (attorney found not guilty of criminal bribery charges suspended from the practice of law for one year); *In re Kien*, 69 Ill. 2d at 361-62, 273 N.E.2d at 379 (18 month suspension ordered); *In re Howard*, 69 Ill. 2d at 350, 372 N.E.2d at 374 (two year suspension ordered). See note 28 and accompanying text *supra*.

Claims of honest motive or good intentions are also irrelevant in attorney discipline cases involving conflict of interest charges. See *In re LaPinska*, 72 Ill. 2d 461, 469-70, 381 N.E.2d 700, 703 (1978) ("[A]n attorney who represents the public must be particularly wary of potential conflicts because he is measured not only by the honesty of his intentions and motives, but by the suspicion with which his acts may be viewed by the public."); *In re Michal*, 415 Ill. 150, 112 N.E.2d 603 (1953); *People v. Gerold*, 265 Ill. 448, 107 N.E. 165 (1914); *Scheffki v. Chicago, M., St. P. & P. RR Co.*, 1 Ill. App. 3d 557, 274 N.E.2d 631 (1st Dist. 1971).

75. In 1975 and 1976, Cambridge Survey Research found that 69 percent of the respondents to a poll agreed that "over the last ten years, this country's leaders have consistently lied to the people. S. BOK, LYING, MORAL CHOICE IN PUBLIC AND PRIVATE LIFE xviii (1978) [hereinafter cited as S. BOK]. In addition, a Harris poll found that between 1966 and 1976, confidence in medicine dropped from 73 percent to 42 percent, confidence in major companies from 55 percent to 16 percent, and confidence in advertising agencies dropped from 21 percent to 7 percent. *Id.* See the text accompanying note 77 *infra* for information on public confidence in law firms.

76. S. BOK, *supra* note 73, at xvi-xxii Bok, who teaches ethics in medicine at Harvard and Massachusetts Institute of Technology, asserts as the thesis of her book that lying is never fully justifiable and that well-meaning lies disguise and fuel other wrongs. *Id.* at 242-49. Analyzing scores of different kinds of lies, all supposedly justified by good motives, Bok concludes that all lies have a detrimental impact on public confidence. *Id.* See note 75 *supra*. In addition to lying for clients, *id.* at 146-164, Bok also rejects justification for placebos, and white lies in letters of recommendation. *Id.* at 57-72. Possibly because of her medical ethics background, she is also quick to argue against deceptive social science research and lies to the sick and dying. *Id.* at 182-202, 220-22.

avalanche of untruthfulness has been cited as a reason for modern skepticism about institutions that were once highly respected. For example, in 1976, only 12 percent of the American public expressed confidence in law firms. In 1973, 24 percent expressed such confidence.⁷⁷

The deceit in this case is especially unwarranted in that non-deceitful alternatives were available to Friedman. Although concurring Justices Underwood and Ryan found that no realistic alternatives were available,⁷⁸ alternative tactics suggested by the other justices included prosecution for attempted bribery,⁷⁹ prosecution for solicitation,⁸⁰ an attorney disciplinary action,⁸¹ or an effort to obtain advance judicial approval of the plan from the trial judge or the chief judge.⁸² The concurring justices, however, considered advising the trial judge improper.⁸³ While seeking some type of judicial approval would allow the decision to be made by an objective third party,⁸⁴ it is still objectionable. A contrived trial would not only waste the court's time, but also create an appearance of impropriety.⁸⁵ Nevertheless,

77. S. BOK, *supra* note 75, at xviii. One possible reason for this decline in confidence in law firms might be that the 1973 poll was taken before the public realized that the Watergate Affair and the events surrounding President Nixon's resignation showed a far-reaching pattern of corruption devised and carried out by many top government attorneys.

78. 76 Ill. 2d at 404-05, 392 N.E.2d at 1338 (Underwood, J., concurring). See notes 51-54 and accompanying text *supra*.

79. Chief Justice Goldenhersh and Justice Kluczynski suggest prosecution for attempted bribery pursuant to ILL. REV. STAT. ch. 38, §§ 8-4, 33-1 (1977). 76 Ill. 2d at 398, 392 N.E.2d at 1336.

Justice Clark pointed out that attorneys can be convicted of conspiring to bribe without money actually changing hands. *United States v. Jacobs*, 431 F.2d 754 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971). 76 Ill. 2d at 408, 392 N.E.2d at 1340 (Clark, J., dissenting).

80. Chief Justice Goldenhersh and Justice Kluczynski noted that Friedman could have charged the attorneys with solicitation of perjury pursuant to ILL. REV. STAT. ch. 38, §§ 8-1, 32-2 (1977). 76 Ill. 2d at 398, 392 N.E.2d at 1336.

81. Justice Clark's dissent also cites cases where attorneys disciplinary actions were successfully maintained after attorneys avoided criminal prosecution. 76 Ill. 2d at 408, 392 N.E.2d at 1340 (Clark, J., dissenting), *citing In re Goldstein*, 411 Ill. 360, 104 N.E.2d 227 (1952), *accord*, *Maryland State Bar Ass'n v. Frank*, 272 Md. 528, 325 A.2d 718 (1974).

82. See note 58 and accompanying text *supra*.

83. Justice Underwood stated in his concurrence that deceiving the judge is preferable to involving the judge in the deceit by giving the bench advance notice of the scheme. 76 Ill. 2d at 405, 392 N.E.2d at 1339 (Underwood, J., concurring).

84. *United States v. United States Dist. Court*, 407 U.S. 297, 314-18 (1972); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (a decision resulting in an invasion of individual privacy should be made by a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.")

85. In addition to wasting the court's time and creating an appearance of impropriety, there is a strong argument to be made that the integrity of the entire system suffers whenever lies are heard in court. See Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 UTAH L. REV. 653.

Moreover, there is a philosophical argument that society suffers when lies are told; therefore, no lie is really justifiable. See notes 75-77 and accompanying text *supra*. *Contra*, FREEDMAN, *supra* note 5, at 27-41.

the state could have prevented the bribing of witnesses and avoided the use of deceit as an investigative method by employing any of the three alternatives provided by statute: attorney discipline, prosecution on attempt charges, or prosecution for solicitation.

IMPACT

Ironically, the prospective rule that *In re Friedman* formulates is contradictory to the court's decision. Although the court decided not to sanction Friedman, the decision will deter deceit because four justices did voice disapproval of the tactic.⁸⁶ Nevertheless, censure would have been the most effective way to ensure that prosecutors will not employ deceitful tactics in Illinois courtrooms.

From a broader perspective, *In re Friedman* is an important case because of the court's acceptance of the good motive defense, illustrating two ways that subjectivity is built into the Illinois attorney discipline system. First, there is no clear standard of conduct for attorneys. The most precedential weight any supreme court discipline decision can ever have is as persuasive authority because there is no strict stare decisis in Illinois attorney discipline cases.⁸⁷ As a result, the Illinois practitioner is left with only a vague, non-binding common law of ethics for guidance.⁸⁸ One justice recently criticized this vague standard stating that "our continued adherence to a case-by-case 'totality of the circumstances' approach will leave our standards opaque and our sanctions unpredictable. Such unpredictability will require every case to be brought before us for review."⁸⁹

In the absence of comprehensive, controlling case law, the Code's frequent application as a standard makes it an important guide for the Illinois attorney. Since the Code's prohibitions against false testimony are clear and intent to permanently deceive is not required by its language,⁹⁰ the court should have followed the Code's ample guidance.⁹¹

Second, subjectivity in the Illinois attorney discipline system is also encouraged by the overly broad use of mitigating evidence. Although mitigating evidence of good character or community involvement is regularly

86. Chief Justice Goldenhersh and Justice Kluczynski both rejected Friedman's investigative tactics, despite the fact that they voted not to censure the respondent. 76 Ill. 2d at 398-99, 392 N.E.2d at 1336. The dissenters, Justice Clark and Justice Moran, each found the prosecutorial deceit repugnant and voted for censure. *Id.* at 406-13, 392 N.E.2d at 1339-43 (Clark, J., and Moran, J., dissenting).

87. See, e.g., *In re Kien*, 69 Ill. 2d 355, 372 N.E.2d 376 (1977); *In re Howard*, 69 Ill. 2d 343, 372 N.E.2d 371 (1977); *In re Nesselson*, 35 Ill. 2d 454, 220 N.E.2d 409 (1966).

88. See notes 20-24 and accompanying text *supra*.

89. *In re Kien*, 69 Ill. 2d at 365-66, 372 N.E.2d at 381 (Clark, J., dissenting).

90. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR7-102(A)(4), DR7-102(A)(6), DR7-109(B), and DR1-102(A)(4).

91. See note 47 *supra* for an explanation of why *In re Luster* is not appropriate persuasive authority for not disciplining Friedman.

examined in determining the punishment in attorney discipline cases,⁹² this kind of evidence is irrelevant because the public should be able to expect good conduct as well as community involvement from every attorney.⁹³ In *In re Friedman*, the affidavits and character references from judges, prosecutors, the Governor of Illinois, a law school dean, and others highly praised Friedman. Some references even expressed approval of the tactics Friedman employed.⁹⁴ Since the supreme court's willingness to accept the defense of good motive results largely from the fact that a number of well-known attorneys supported Friedman,⁹⁵ *In re Friedman* lends credibility to the position that broad mitigating evidence is sometimes misapplied. In the future, such evidence should be carefully applied so as only to mitigate punishment and should not be applied as a defense to substantive charges.⁹⁶

CONCLUSION

The disciplinary charges against the respondent in *In re Friedman* should not have been discharged. Good motive is not an acceptable justification for deceiving the judiciary and using the court system as an investigative tool. Allowing a good motive defense is harmful not only because it invites invasion of the judicial function and possible abuses of the rights of private citizens, but also because motive is impossible to ascertain accurately. Furthermore, if deceit may ever be justified, it is an inappropriate practice under statutes providing several means for limiting corruption through more traditional law enforcement methods. Employment of a good motive justification to avoid censuring a prominent attorney suggests an embarrassing degree of subjectivity in an attorney discipline system, allowing broad judicial discretion in the application of already vague standards.

Robert C. Cook

92. Although evidence of good character or reputation is no defense to specific misconduct charges, it is an element often considered in mitigation of discipline. See, e.g., *In re Kien*, 69 Ill. 2d 355, 372 N.E.2d 376 (1977) (18 month suspension ordered in bribery case); *In re Howard*, 69 Ill. 2d 343, 372 N.E.2d 371 (1977) (two year suspension ordered in bribery case); and *In re Costigan*, 63 Ill. 2d 230, 347 N.E.2d 129 (1976) (two year suspension for forging clients' names to secure a loan for paying personal debts).

93. *In re Kien*, 69 Ill. 2d at 365-66, 372 N.E.2d at 381 (Clark, J., dissenting). For a more harsh opinion on why broad use of mitigating evidence is undesirable, see also S. TISHER, L. BERNABEI AND M. GREEN, BRINGING THE BAR TO JUSTICE 97 (1977). ("When sanctions are imposed disciplinary boards often search out mitigating circumstances to cushion the blow").

94. 76 Ill. 2d at 398-401, 392 N.E.2d at 1336-37.

95. *Id.*

96. Swett, *Illinois Attorney Discipline*, 26 DEPAUL L. REV. 325, 344 (1977). "Failure to keep the issues clearly defined makes it treacherously easy for the disciplinary body to make its decision on its opinion of the responding attorney's character rather than on the merits of the case." *Id.* at 355.